

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NOEL W. SPAID,

Plaintiff and Appellant,

v.

CALIFORNIA FRANCHISE TAX BOARD
et al.,

Defendants and Respondents.

D048338

(Super. Ct. No. GIC830217)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

Noel W. Spaid, a licensed attorney, challenges the trial court's granting of a summary judgment in favor of the California Franchise Tax Board (Board). After Spaid failed to file tax returns with the Board for two years, the Board sent her repeated notices advising her to file or explain why she did not have to file and warning her that if she did not do so, the Board would estimate her tax liability. Spaid failed to file the returns and

failed to provide the Board with information indicating she was not required to file. Accordingly, the Board estimated her tax liability and, when she did not pay, seized the funds from her bank account. During pretrial discovery and at the summary judgment proceedings, Spaid continued to refuse to provide information about her income, instead relying on an argument that the Board's estimations of her tax liability were invalid assessments without factual foundation.

We hold the Board's estimations of Spaid's income based on her active attorney license and the average earnings of attorneys rested on a reasonable factual foundation and were therefore valid tax assessments. Under well-established tax principles, a tax payer has the burden to show a reasonably based tax assessment is incorrect. Because Spaid refused to provide the information necessary to determine her actual tax liability, on this record she cannot carry her burden to prove the Board's assessments were incorrect. Accordingly, the trial court properly granted summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Spaid did not file California income tax returns for 2000 and 2001. In January 2004 the Board seized \$19,149.64 from Spaid's bank account for the two tax years. Spaid filed a complaint seeking a refund of the seized money and damages. She alleged that the Board (1) had improperly imposed "naked" tax assessments that were without a supporting factual basis, and (2) had violated her due process rights by refusing her requests for a hearing before seizure of the funds. She also alleged that the Board and a Board employee had violated her federal civil rights under title 42 United States Code

section 1983 (USC section 1983). The Board successfully moved for summary judgment.

A. The Board's Seizure of Spaid's Funds

The Board submitted evidence depicting its assessment and collection procedures and showing that before the final assessment and seizure of Spaid's funds Spaid was given repeated notices and opportunities to file her returns or to show she had no obligation to file.

The Board's seizure was based on its "Integrated Non-filer Compliance Program," which matches information from various reporting sources, including professional licensing boards, against filed tax returns to identify persons who have not filed returns. When the Board determines an active license holder has not filed a tax return, the Board estimates the person's earnings based on an "industry average"; i.e., the average income reported by persons in the same occupation for that tax year.

The Board received information from the State Bar of California that Spaid had a current license for tax years 2000 and 2001. By May 2002 Spaid had not filed a tax return for 2000. Accordingly, on May 20, 2002, the Board sent Spaid a demand for tax return letter, which required Spaid to respond by June 19, 2002, either by filing a 2000 return or explaining why a 2000 return was not required. The demand letter advised Spaid that if she had a filing requirement, she should file her return by the specified June 2002 date to avoid a tax assessment by the Board and additional charges.

Spaid did not respond as requested to the May 2002 demand for tax return. Accordingly, on August 28, 2002, the Board issued a notice of proposed assessment

(NPA) for 2000. In the proposed assessment, the Board used its industry averaging methodology to estimate Spaid's income. The Board calculated Spaid's tax liability to be \$8,868.07 (\$5,332 for taxes and \$3,536.07 for penalties and interest), based on an estimated income of \$79,830, minus a standard deduction and exemption credit for a single individual with no dependents. The notice advised Spaid that the proposed assessment was due October 28, 2002, unless the Board received Spaid's tax return or information indicating she had no filing requirement. The notice also informed Spaid that if she disagreed with the assessment, she should mail a protest within 60 days of the date of the mailed notice, i.e., by October 28, 2002.

On February 3, 2003, the Board sent Spaid an income tax due notice for 2000, stating that she owed \$9,101.92, and advising her that if the balance was not paid within 30 days the Board could take collection action. On March 11, 2003, the Board sent Spaid a final notice, stating she owed \$9,155.29, and instructing her to pay by March 26, 2003. The final notice advised Spaid that the Board could begin collection actions without further notice, including taking wages, seizing deposit accounts, and seizing and selling real and personal property.

Similar procedures were followed for the year 2001. On January 21, 2003, the Board sent Spaid a demand for tax return for 2001 due February 26, 2003. On March 24, 2003, the Board sent Spaid an NPA of \$9,042.84 for 2001 (\$5,672 for taxes and \$3,370.84 for penalties and interest), based on an estimated income of \$84,612 and calculated under the same methodology as used for 2000. The NPA instructed Spaid to

file a return or a protest by May 23, 2003. A notice of state income tax due for 2001 was sent on June 23, 2003, stating that the assessment was final and due.

On April 28, 2003, the Board sent Spaid's bank an order to withhold \$9,327.96 for the 2000 tax year. Spaid sent a letter dated May 2, 2003, to the Board protesting the 2000 assessment and requesting a hearing.¹ According to Spaid, she called the Board and advised it that she had requested a hearing to challenge this assessment. On May 5, 2003, the Board withdrew the April withholding order. Spaid sent a letter dated June 26, 2003 to the Board protesting the 2001 assessment. On August 26, 2003, the Board sent Spaid's bank an order to withhold \$18,754.20 for tax years 2000 and 2001. Spaid again called the Board about her request for a hearing, and on September 12, 2003, the Board withdrew this withholding order. Finally, on January 28, 2004, the Board sent Spaid's bank an order to withhold \$19,149.64 for tax years 2000 and 2001. Spaid again contacted the Board, but this time did not succeed in having the withholding order withdrawn. In February 2004 the Board acquired the requested funds.

Thereafter, the Board sent Spaid a letter stating that the time for a hearing on the 2000 and 2001 assessments had expired.²

¹ There was apparently some question whether the Board received this protest letter, as well as a second protest letter sent in June 2003. However, in its statement of undisputed facts the Board conceded the letters were sent.

² As we delineate *post*, Spaid's protest letters were dated after the expiration of the protest periods for the 2000 and 2001 assessments. However, notwithstanding the dates on the letters, Spaid submitted a declaration stating she was certain she mailed the letters in timely fashion.

B. The Parties' Assertions in the Summary Judgment Proceedings

1. Naked assessment

Arguing in support of summary judgment, the Board contended it had established a rational factual foundation for the tax assessment based on the fact that Spaid was a licensed attorney. Accordingly, the Board asserted it had met its burden to trigger the presumption of correctness applied to a reasonably based tax assessment and that it was Spaid's burden to show the assessments were incorrect by showing the proper amount of the tax. The Board argued that Spaid had not set forth the correct amount of her income or taxes for 2000 or 2001 and, absent such a showing, she could not carry her burden to show the Board's tax assessments were incorrect.

In opposition, Spaid did not deny that she was a licensed attorney during 2000 and 2001, nor did she provide any information regarding her income or tax liability for those two years. Instead, she relied on her assertion that the Board's tax assessments were naked assessments and contended she had no burden to provide any evidence regarding the actual amount of her tax liability or her exemption from a tax filing requirement for those years. To support her argument that the Board had failed to show a factual basis for its assessments, she asserted that the mere fact that a person had a professional license did not show he or she used that license or generated income from that license, and that the Board's industry averaging methodology was arbitrary because it did not take into consideration any facts concerning the individual taxpayer. Spaid submitted a declaration stating that the Board had information in its files showing that during the 12 years prior to 2000 her annual tax liability ranged from about \$90 to \$150, and that her 1999 tax return

on file with the Board indicated a house sale which showed she had income to support herself apart from earned income.

2. Due process

Regarding the due process issue arising from the Board's failure to afford Spaid a hearing before seizing the funds, the Board contended that Spaid had failed to submit a request for a hearing within the 60-day period after the mailing of the proposed assessments as required by statute. To support this assertion, the Board provided the two protest letters from Spaid to the Board wherein she requested hearings, asserted that the assessments were invalid naked assessments, and stated that she did not believe she owed any taxes for 2000 or 2001. The letters were dated after the expiration of the 60-day periods. Spaid's letter protesting the 2000 tax assessment was dated May 2, 2003, which was after the October 28, 2002 expiration date for filing a protest for the 2000 NPA. Her letter protesting the 2001 tax assessment was dated June 26, 2003, which was after the May 23, 2003 expiration date for protesting the 2001 NPA.

In opposition, Spaid acknowledged that the letters were dated after the 60-day periods, but stated in her declaration that she was "positive" she sent them in timely fashion. Further, she asserted that the Board had waived or was estopped from asserting a claim that her protest letters were untimely. To support this assertion, she declared that when she communicated to the Board regarding the first two bank withholding orders she told the Board she had requested a hearing and the Board never told her that her requests were untimely. Rather, the Board withdrew the withholding orders and told her she would be contacted about a hearing date. She stated that if the Board had told her the

protest letters were untimely, she would have requested permission to file late protests as permitted under Board procedures.

3. Exclusion of Spaid's declaration

In a reply to Spaid's opposition to summary judgment, the Board objected to the trial court's consideration of Spaid's declaration. The Board stated that during discovery Spaid had asserted her Fifth Amendment privilege and refused to provide any information regarding her income or work during 2000 and 2001. Because of her refusal to provide this necessary information, the Board argued the court should preclude her from introducing any evidence in opposition to the summary judgment motion or at trial. The Board provided copies of Spaid's responses to interrogatories and deposition questions, where she invoked the privilege against self-incrimination regarding questions pertinent to her income or work in 2000 and 2001.

Spaid retorted that the court should not use the evidence-exclusion rule applied to plaintiffs who assert the Fifth Amendment privilege and refuse to provide information because she was not required to provide evidence if the assessment was a naked assessment and, further, the Board's seizure of funds forced her to file suit.

C. Trial Court's Ruling

The trial court agreed with the Board that because Spaid had refused to answer questions concerning her income during discovery, her declaration in opposition to summary judgment should not be considered. (See *A & M Records, Inc. v. Heilman*

(1977) 75 Cal.App.3d 554, 566-567.) The trial court resolved the summary judgment motion based solely on the evidence submitted by the Board in its moving papers.³

The court found the Board had shown a rational basis for the tax assessments based on the fact that Spaid was a licensed attorney and based on the average earnings of licensed attorneys. The court found that Spaid had an opportunity to inform the Board that her earnings were less than the average, but she declined to do so. The court concluded the Board had shown there were no triable issues of fact, and granted summary judgment.

DISCUSSION

On appeal, Spaid asserts the court erred in granting summary judgment because (1) the Board's assessments were invalid because they were without a factual foundation; (2) the Board violated her due process rights by not affording her a hearing before seizing the funds and because there are triable issues of fact whether her protest letters were timely and whether the Board should be barred from asserting untimeliness under principles of waiver and estoppel; (3) the court erred in refusing to consider her declaration in opposition to the summary judgment motion; and (4) there are triable

³ In a reply brief to Spaid's opposition to the summary judgment motion, the Board asked the trial court to take judicial notice of several tax and federal court opinions filed in 2000, 2001 and 2002 in which Spaid was listed as a party's attorney. Spaid objected to the trial court's consideration of this information on various grounds, including that it was irrelevant because the Board did not know about or use the information when making the assessments. The trial court stated it did not need to rule on her objections because it was granting the summary judgment based only on the evidence in the Board's moving papers.

issues of fact whether the Board and the Board employee violated her USC section 1983 civil rights.

Summary Judgment Standard

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) The moving party bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if this burden is met, the burden of production shifts to the opposing party to make a prima facie showing of a triable issue of material fact. (*Ibid.*) On appeal from a summary judgment, we review the record de novo, considering all of the evidence presented by the parties except evidence properly excluded by the trial court. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidentiary showing while strictly scrutinizing the moving party's showing. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

Governing Tax Principles

A. Board's Authority To Use Estimated Tax Assessment and Withhold Funds

California's Revenue and Taxation Code⁴ sets forth the procedures for the Board to follow when a taxpayer fails to file a return, including estimation of the taxpayer's

⁴ Statutory references are to the Revenue and Taxation Code unless otherwise specified.

income and seizure of funds when the taxpayer fails to pay. Section 19087, subdivision (a) provides that if a taxpayer fails to file a tax return, the Board "may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due." The taxpayer has the right to protest an assessment based on estimated income by filing a written protest within 60 days after the mailing of the notice of proposed assessment. (§§ 19087, subd. (b), 19041; 38 Cal.Jur.3d (2006) Income Taxes, § 103, p. 139.) If a protest is filed, the Board must reconsider the assessment and, if requested, provide a hearing. (§ 19044.) If no protest is filed, the amount of the proposed assessment becomes final upon the expiration of the 60-day period. (§ 19042.)

When the assessment becomes final (either after the failure to file a protest or the termination of administrative proceedings), the Board must mail a notice and demand for payment to the taxpayer. (§ 19049.) If the taxpayer does not pay the assessment, the Board may require any person in control of the taxpayer's income to withhold the amount of the assessment and to transmit the monies to the Board. (§ 18662, subd. (a).) Such collection activity is authorized even without a judicial determination of tax liability in order to ensure that litigation does not delay the prompt payment of taxes for the public welfare. (*People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 546.) The taxpayer's due process rights are protected in appropriate cases by the opportunity for a precollection administrative hearing and a postcollection action to recover the funds. (*Ibid.*; *Aronoff v. Franchise Tax Board* (1963) 60 Cal.2d 177, 179;

Dupuy v. Superior Court (1975) 15 Cal.3d 410, 415-417; *Franchise Tax Bd. v. Superior Court* (1989) 212 Cal.App.3d 1343, 1349.)

B. Burdens of Proof in Action Challenging Tax Assessment/Withholding

In tax litigation, a presumption of correctness generally attaches to tax assessments. (*Hardy v. C.I.R.* (9th Cir. 1999) 181 F.3d 1002, 1004.)⁵ However, in a case involving unreported income the presumption of correctness does not apply if the taxing authority makes a naked assessment; i.e., a tax assessment that is without rational foundation. (*U.S. v. Janis* (1976) 428 U.S. 433, 441-442; *Hardy, supra*, 181 F.3d at p. 1004.) The presumption of correctness "is only as strong as its rational underpinnings. Where it lacks a rational basis the presumption evaporates." [Citation.] *Some* reasonable foundation for the assessment is necessary to preserve the presumption of correctness." (*Erickson v. C.I.R.* (10th Cir. 1991) 937 F.2d 1548, 1551.) The naked assessment doctrine is "a challenge to the . . . assessment itself on the basis that it bears no factual relationship to the taxpayer's liability, not a challenge to any proof offered by the [taxing authority] at trial" (*Gold Emporium, Inc. v. C.I.R.* (7th Cir. 1990) 910 F.2d 1374, 1378.)

Even if a taxpayer presents no evidence, the tax assessment will be invalidated if the taxing authority does not make this threshold showing that the assessment is

⁵ Case authority under federal tax law may properly be used for guidance in California tax cases, unless a state statute contravenes the federal approach. (See 38 Cal.Jur.3d, *Income Taxes, supra*, § 7, pp. 15-17; *People v. Hagen* (1998) 19 Cal.4th 652, 666.)

supported by a factual foundation. (*Gerardo v. C.I.R.* (3d Cir. 1977) 552 F.2d 549, 554; see *White v. Cardoza* (Mich.D.Ct. 1973) 368 F.Supp. 1397, 1400.) The taxing authority must present some minimal, substantive evidence linking the taxpayer to the charged income-generating activity or reflecting unreported income to justify the assessment. (*Erickson v. C.I.R.*, *supra*, 937 F.2d at pp. 1551-1552; *Weimerskirch v. C.I.R.* (9th Cir. 1979) 596 F.2d 358, 360-361; *U.S. v. Stonehill* (9th Cir. 1983) 702 F.2d 1288, 1293.)

When a taxpayer fails to provide adequate income information to the taxing authority, the taxing authority has wide discretion to choose an income reconstruction method. (*Palmer v. U.S. I.R.S.* (9th Cir. 1997) 116 F.3d 1309, 1312.) If the taxing authority's estimation method is reasonable, the courts will presume it is correct unless the taxpayer shows otherwise. (*U.S. v. Fior D'Italia* (2002) 536 U.S. 238, 243-244; *Palmer*, *supra*, 116 F.3d at p. 1312; *Cracchiola v. C.I.R.* (9th Cir. 1981) 643 F.2d 1383, 1385.) The taxing authority may use statistics to estimate income; however, the statistics must be reasonably employed to approximate the correct amount of income. (*Palmer*, *supra*, 116 F.3d at p. 1312.)

If the taxing authority triggers application of the presumption of correctness by introducing some evidence of a factual foundation to justify the tax assessment, the burden shifts to the taxpayer to rebut the presumption by showing by a preponderance of the evidence that the assessment was arbitrary or erroneous. (*Gold Emporium, Inc. v. C.I.R.*, *supra*, 910 F.2d at p. 1378; *Hardy v. C.I.R.*, *supra*, 181 F.3d at p. 1005; *Rapp v. C.I.R.* (9th Cir. 1985) 774 F.2d 932, 935.) "The taxpayer must not only prove that the tax assessment is incorrect, but also [] must produce evidence to establish the proper amount

of the tax." (*Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744.)

Analysis

As a threshold matter, the Board asserts summary judgment was properly granted because Spaid failed to file a written claim for refund prior to initiation of the lawsuit against the Board. Section 19382 provides that a taxpayer may file a suit to recover money from the Board "after payment of the tax and denial by the [Board] of a claim for refund."⁶ This section requires the taxpayer to pay the tax and file a claim for refund as a prerequisite to filing a lawsuit. (*Milhous v. Franchise Tax Bd.* (2005) 131 Cal.App.4th 1260, 1266; *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 986 (*McKnight*).) The requirement that the taxpayer file a claim for refund is designed "to ensure that the Board receives sufficient notice of the claim and its basis. [Citation.] The Board then has an opportunity to correct any mistakes, thereby conserving judicial resources." (*McKnight, supra*, at p. 986.) The claim for refund does not have to be in any particular form, but it should be in writing and state the grounds for the refund so as to provide the Board with notice. (*Ibid.*)⁷ Section 19382 does not

⁶ Section 19382 states: "Except as provided in Section 19385, after payment of the tax and denial by the [Board] of a claim for refund, any taxpayer claiming that the tax computed and assessed is void in whole or in part may bring an action, upon the grounds set forth in that claim for refund, against the [Board] for the recovery of the whole or any part of the amount paid."

⁷ Section 19322 states: "Every claim for refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds upon which it is founded. . . ."

indicate whether the claim refund requirement applies to the situation when the Board collects the tax through an order to withhold funds, as opposed to the situation when the taxpayer pays the tax under protest in order to be able to initiate a lawsuit. We need not decide whether the claim refund requirement applies to a collection situation, nor need we decide if Spaid's written communications to the Board could satisfy the claim fund requirement. As we shall explain, even considering the merits of Spaid's various assertions, the trial court properly granted summary judgment.

Spaid asserts the Board imposed invalid naked assessments because the mere holding of a license does not show income-producing activity, and there are no facts indicating she produced income from her attorney license during 2000 or 2001. She also contends the assessment was invalid because the Board's industry averaging methodology did not consider the number of years an attorney has been in practice and it did not consider information in the Board's files regarding past tax history.

We are not persuaded. The fact that a taxpayer holds an active attorney license is sufficient to establish the minimal, rational foundation required to validate an income assessment. A taxpayer who holds an active attorney license is recognized by the State of California as authorized to practice law. For purposes of imposing a tax assessment on an attorney who fails to file a tax return, it is reasonable for the Board to assume that if the attorney was not currently practicing law he or she would place the license on inactive status, and to assume that a practicing attorney has generated taxable income.

Further, it is reasonable for the Board to calculate the assessment based on average attorney earnings. When the Board implements a system of monitoring and assessing

nonfilers based on current professional licenses, it is not reasonable to impose a mandatory duty on the Board to investigate each license holder's particular situation, including such matters as the number of years the person has held the license or the person's past tax history. It is the taxpayer's responsibility to file a tax return and, if the taxpayer refuses to do so after being given notice by the Board, the Board can properly use a reasonable, standardized income estimation system without regard to the peculiarities of each taxpayer's situation. Further, the Board should not be required to consider a person's prior tax returns to assess current liability, given that a person's income can substantially change for any particular tax year. This does not, of course, mean that Spaid was required to pay taxes based on an average attorney's income; it merely means that the burden shifted to her to provide the necessary information to calculate her correct tax liability.

Because the Board's tax assessments were rationally based, it was Spaid's burden to show that the amount of the assessments based on income averaging were incorrect and to show her correct tax liability. Spaid refused at all times—during her communications with the Board, during pretrial discovery, and during the summary judgment proceedings—to provide any information regarding her income or work activity during tax years 2000 and 2001. In her protest letters to the Board, Spaid did assert that she did not believe she owed taxes for 2000 or 2001. However, she never proffered any information from those tax years to support this assertion. To show the Board's assessments of her estimated income for 2000 and 2001 were incorrect, Spaid

needed to provide information about her 2000 and 2001 income, not about her income in previous years.⁸

The fact that the tax assessment could have been deemed invalid if it lacked a factual foundation, even with no presentation of evidence by Spaid, did not excuse Spaid from her obligation to present evidence to support her claim in the event the assessment was found valid. That is, Spaid needed to anticipate the possibility that she would not prevail on her naked assessment assertion and to present facts regarding her 2000 and 2001 tax liability to show the inaccuracy of the Board's assessment. (See *West Pub. Co. v. McColgan* (1946) 27 Cal.2d 705, 711-712.)

A court may properly deny relief to a taxpayer who declines to reveal actual income or produce records to controvert a reasonably based tax assessment. (See, e.g., *Pollard v. C.I.R.* (11th Cir. 1986) 786 F.2d 1063, 1066; *Edwards v. C.I.R.* (9th Cir. 1982) 680 F.2d 1268, 1270.) The taxpayer's assertion of the Fifth Amendment privilege based on a concern for tax evasion culpability will not suffice to avoid a dismissal of the taxpayer's action for a failure of proof. (*Edwards v. C.I.R.*, *supra*, at p. 1270.) Given Spaid's failure to provide the tax information for the years 2000 and 2001, she cannot carry her burden to show the assessments for those years were incorrect.

⁸ We note that although the trial court excluded Spaid's declaration from its consideration, at the summary judgment hearing the court did ask the Board to respond to her claim that the Board's files showed she earned substantially less than the average attorney in previous years. The Board responded that it was not required to consider her past tax history because each tax year stands alone. As we stated, we agree with the Board's assertion on this point.

In sum, the Department showed that the assessment was supported by a reasonable factual foundation and that Spaid had not provided the necessary tax information to establish the inaccuracy of the assessment. Absent evidence that the assessment was erroneous, there is no triable issue of fact regarding Spaid's claim for refund of the money.

The Board's showing that the tax assessment rested on a reasonable factual foundation and Spaid's failure to provide the relevant tax information also dispense with Spaid's remaining contentions of error. Even assuming there is a triable issue of fact regarding whether the Department erred in denying Spaid a precollection hearing, she has suffered no prejudice because she cannot prevail on her claim of a naked assessment. Further, even without a hearing Spaid had repeated opportunities prior to the seizure of the funds to present information to the Board regarding her actual tax liability for 2000 and 2001. Thus, the Board's denial of a hearing did not deprive Spaid of an opportunity to present the necessary tax information and to stop the seizure based on the estimated tax liability.

Similarly, even assuming the trial court should have considered Spaid's declaration in opposition to the summary judgment, she has suffered no prejudice. There is nothing in the declaration that defeats the Board's showing that the tax assessments were based on a reasonable factual foundation and therefore valid. Further, her declaration does not include information regarding her 2000 or 2001 tax liability which is necessary to create a triable issue on the correctness of the assessments.

Finally, Spaid cannot prevail on her claim that her USC section 1983 civil rights were violated. Even assuming a USC section 1983 cause of action could otherwise be stated in this case, because the assessment had a reasonable basis and Spaid refused to provide the Board with her actual tax information to show the inaccuracy of the assessment, she cannot show her rights were violated by the seizure of the money.

The trial court properly granted summary judgment.⁹

DISPOSITION

The judgment is affirmed. Spaid shall pay the Board's costs on appeal.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.

⁹ Given our affirmance of the summary judgment on the grounds set forth above, we need not address the Board's arguments pertaining to governmental immunity.